NO. 65681

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA DEPARTMENT OF EMPLOYMENT,
TRAINING AND REHABILITATION,
EMPLOYMENT SECURITY DIVISION,

Appellant,

vs.

CALVIN STEVEN MURPHY,

Respondent.

On Appeal from the Eighth Judicial District Court
of the State of Nevada, in and for
the County of Clark
District Court Case No. A689756

APPELLANT'S REPLY BRIEF

J. THOMAS SUSICH, ESQ.
Nevada State Bar No. 898
NEIL A. ROMBARDO, ESQ.
Nevada State Bar No. 6800
State of Nevada, Department of Employment,
Training & Rehabilitation (DETR),
Employment Security Division (ESD)
1325 Corporate Boulevard, Suite C
Reno, Nevada 89502
(775) 823-6673
(775) 823-6691 – Fax
Attorneys for Appellant

RON SUNG, ESQ.
Nevada State Bar No. 13047C
I. KRISTINE BERGSTROM, ESQ.
Nevada State Bar No. 10841
Nevada Legal Services, Inc.
530 South Sixth Street
Las Vegas, NV 89101
(702) 386-0404
(702) 386-1614 – Fax
Attorneys for Respondent

TABLE OF CONTENTS

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Suite C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Suite C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

TABLE OF AUTHORITIES

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Suite C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

TABLE OF STATUTES

State Statutes

Other Rules, Codes, Publications

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

JURISDICTIONAL STATEMENT

ESD adopts the Jurisdictional Statement set forth in its Opening Brief.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

ESD adopts the Statement of the Issue Presented for Review set forth in its Opening Brief.

STATEMENT OF THE NATURE OF THE CASE

ESD adopts the Statement of the Nature of the Case set forth in its Opening Brief.

STATEMENT OF THE FACTS

ESD adopts the Statement of the Facts as set forth in its Opening Brief.

SUMMARY OF ARGUMENT

ESD adopts the Summary of Argument set forth in its Opening Brief.

STANDARD OF REVIEW

ESD adopts the Standard of Review set forth in its Opening Brief.

///

///

///

///

///

///

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

ARGUMENT

A. EMPLOYMENT SECURITY DIVISION (ESD) APPLIED THE CORRECT STANDARD OF REVIEW AND MURPHY MIS-STATES THE REASON FOR HIS DENIAL OF UNEMPLOYMENT BENEFITS.

1. Standard of Review

The standard of review in administrative matters is:

> [O]ur function, which is identical to that of the district court, is to review the evidence presented to the agency and ascertain whether the agency *abused its discretion by acting arbitrarily or capriciously.*
>
> In performing our review, we are *limited to the record below,* and we will not substitute our judgment for that of the agency as to the weight of evidence on a *question of fact.* We may set aside the agency's final decision *only if the decision prejudices the appellant's substantial rights because it is*, among other things, *affected by error of law* or *clearly erroneous* in view of the reliable, probative, and substantial evidence in the record. Furthermore, when an *agency's conclusions of law are closely related to its view of the facts,* those conclusions are *entitled to deference,* and we will not disturb them if they are supported *by substantial evidence.* 'Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion.' (Emphasis added.)

Father & Sons & A Daughter Too v. Transportation Services Authority of Nevada, 124 Nev. 254, 259, 182 P.3d 100, 103-104 (2008).

Murphy's brief argues that ESD argued the wrong standard of review because *State, Employment Security Division v. Evans*, 111 Nev. 1118, 901 P.2d 156 (1995), creates an exception for incarceration as a matter of law. However,

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

such an exception does not exist in the law and cannot be created by the judicial branch of government. NRS 612.385 states, "A person is ineligible for benefits ..., if he or she was discharged from his or her last or next to last employment for misconduct connected with the person's work." Nowhere does NRS 612.385 state that an employee's inability to attend work because of incarceration is an exception from misconduct related to employment. To the contrary, this Court previously found that failure to attend work is misconduct related to employment. *See Kraft v. Nevada Employment Security Department*, 102 Nev. 191, 717 P.2d 583 (1986)(Employee committed misconduct because he waited by his disabled vehicle for three hours without noticing employer of the reason for his failure to appear at work.) *Nevada Employment Security Department v. Nacheff*, 104 Nev. 347, 757 P.2d 787 (1988)(Employee committed misconduct because he provided one day notice for being sick, but then failed to appear at work for multiple days without notice.)

The Court also ruled that failing to show for work may, or may not, be misconduct under NRS 612.385, and that it is a factual determination. *See Clark County School District v. Bundley*, 122 Nev. 1440, 148 P.3d 750 (2006)(Court remanded case for more evidence on whether the employee's absences were taken in willful violation or disregard of a reasonable employment policy.)

///

///

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

In *Bundley* at 755, 1446, the Court stated, "As the determination whether Bundley's acts (absence from work without notice or approval) constituted misconduct is, thus, a fact-based question of law, the Board's decision is entitled to deference." Similarly, in this case, whether Murphy committed misconduct for purposes of NRS 612.385 is a fact-based question of law, not a pure issue of law as asserted by Murphy. As a result, the standard of review is as stated by ESD in its Opening Brief and indicated in *Father & Sons & A Daughter Too*, 124 Nev. at 259, 182 P.3d at 103-104.

2. ESD denied Murphy's benefits because he committed misconduct related to his work by deliberately violating, or with disregard for, a clear reasonable policy of his employer.

Here, Murphy's admitted criminal conduct not only resulted in his incarceration, but it also resulted in his subsequent no call/no show to work. Greystone terminated Murphy for being a no call/no show in violation of their clear policy, which was known by Murphy. (Joint Appendix, p. 18) The referee's decision, which was adopted by the Board of Review, states, "This case differs from Evans." (JA, p. 19) In this factual determination, the referee found being a no show/no call under the facts of this case is misconduct related to employment. Substantial evidence exists in the record to support the Board and referee's decision; and as a result, the decision should be upheld.

///

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

B. *EVANS* DOES NOT CREATE AN EXCEPTION TO DENIAL OF BENEFITS UNDER NRS 612.380, 612.383, OR 612.385.

Murphy asks the Court to adopt that *Evans* creates some type of an exception to the denial of benefits under NRS 612.380, 612.383, and 612.385. However, Murphy confuses the analysis in *Evans*. In *Evans,* the Court is analyzing the facts under NRS 612.385. The Court states that under the facts of *Evans*, there is no misconduct. Exceptions to a statute are not to be inferred by the judicial branch of government, they are to be created by the legislative branch of government. Otherwise, where a statute is unambiguous, the Court follows the plain meaning of a statute. *See In re Estate of Prestie*, 122 Nev. 807, 812, 138 P.3d 520, 523 (2006). In this case, NRS 612.385 is unambiguous and there is no *Evans* exception in the law. As a result, *Evans* does not create an exception to the statutory scheme of NRS 612.

C. ESD PROPERLY ANALYZES *EVANS*, WHICH CREATES THREE FACTORS TO LOOK AT IN DETERMINING WHETHER *EVANS* APPLIES TO A CASE.

Murphy's argument is that as long as it is impossible for an employee to make it to work and notifies the employer, there cannot be misconduct. This is an oversimplification of *Evans* by Murphy.

///

///

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

(1) First Factor

The Court in *Evans* stated, "Further, Evans' failure to be available for work was due to her *pretrial incarceration* which was *predicated on her inability to obtain bail, not her criminal conduct.*" (Emphasis Added.) *See Evans,* 111 Nev. at 119, 901 P.2d at 157. It is only logical to conclude from this sentence that if Evans was unavailable for work because of her "criminal conduct," then potentially that is misconduct for purposes of NRS 612.385. Otherwise, the Court would not need to add the dangling clause, "not her criminal conduct." Therefore, if the failure to be available for work was due to the employee's criminal conduct, then that can be misconduct.

To further this argument, the Court, in *Evans*, mentioned the employee's custodial status pending trial and the inability to pay bail a half dozen times in a 4 paragraph, 11 sentence opinion. Clearly, the employee's indigent status was a concern for the Court. From a public policy perspective, the Court's logic is understandable. The Court does not want an employee arrested for a crime before incarceration, who cannot obtain bail, and therefore, cannot attend work, to be denied unemployment benefits.

However, according to the administrative decision in this case, the facts of Murphy are different from *Evans*. The referee found that Murphy knowingly committed the crime, admitted to committing the crime at the hearing, failed to give dutiful notice to his employer, and failed to show to work in violation

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

of a clear employer policy regarding no call/no show. These are factual determinations left to the Board of Review; and, based on the administrative record, substantial evidence existed to find these distinctions from *Evans*. Thus, the Board's decision should be affirmed.

(2) Second Factor

Murphy asserts that *Evans* created some sort of exception to NRS 612.380, 612.383, and 612.385 and that ESD erred by analyzing Murphy under NRS 612.385 because of *Evans*. However, as previously stated (See Section B, *supra*), the Court analyzed *Evans* pursuant to NRS 612.385. In order for there to be misconduct under NRS 612.385, the misconduct must be "connected with the person's work."[1] In fact, the Court stated, "Evans is guilty of no 'misconduct' and no 'deliberate violation or disregard on [her part] of standards of behavior which [her] employer has the right to expect. *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968)." The *Barnum* case is an NRS 612.385 "misconduct" case. It is clear that the *Evans* Court analyzed the facts under NRS 612.385; and as a result, for there to be misconduct and denial of benefits under NRS 612.385, the

[1] NRS 612.385 states:

A person is ineligible for benefits for the week in which the person has filed a claim for benefits, if he or she was discharged from his or her last or next to last employment for misconduct *connected with the person's work*, and remains ineligible until the person earns remuneration in covered employment equal to or exceeding his or her weekly benefit amount in each of not more than 15 weeks thereafter as determined by the Administrator in each case according to the seriousness of the misconduct. (Emphasis added.)

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

misconduct must be related to the employee's work. Thus, this is a required factor even under *Evans*.

(3) Third Factor

According to the administrative decision, "dutiful notice" under *Evans* is more than the minimal contact asserted by Murphy. In *Evans*, the employee immediately contacted her employer. She also asked for and received three 30-day leaves of absence. *Evans,* 111 Nev. at 1119, 901 P.2d at 157. Clearly, the employee in *Evans* maintained contact with her employer and did everything she could to provide the employer notice of her status.

Here, the administrative decision found Murphy did not make "dutiful" contact with his employer. His girlfriend contacted the employer at his request a day after his arrest on June 2, 2012. (JA, p. 18) He made no contact on June 4, 2012, his next scheduled day for work. (JA, p. 18) On June 10, 2012, Murphy found out he would be incarcerated for a year and sometime thereafter, Murphy's girlfriend spoke to the manager and inquired about picking up Murphy's check and nothing more. (JA, p. 18) It was at this point the employer informed Murphy's girlfriend that the employer could no longer keep his position available. (JA, p. 18)

Murphy's facts are more akin to *Nevada Employment Security Department v. Nacheff*, 104 Nev. 347, 757 P.2d 787 (1988), than *Evans*. In *Nacheff*, he provided notice to his employer of his illness on July 7, 1987. He did

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

not present himself to work the following two days and he failed to provide notice or make reasonable attempts to give notice. *Id.* at 349, 788. Nacheff's lung illness, which was related to his work going in and out of freezers, made it impossible for him to show to work. The Court found that to be misconduct.

Similarly, Murphy provided notice on June 2, 2012. He did not make contact again until after June 10, 2012, and at that time, the employer still did not receive information on his status. Thus, this Court should uphold the administrative decision.

D. THE REFEREE AND BOARD FOUND MURPHY'S CIRCUMSTANCES DISTINGUISHABLE FROM *EVANS* AND THERE'S SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THAT DETERMINATION.

In *Bundley,* 122 Nev. at 1448, 148 P.3d at 756, this Court concluded:

> [T]hat in Nevada, if an employer asserts that a former employee is disqualified from receiving unemployment benefits because that employee was discharged due to misconduct, the *employer bears the burden* of so proving by a preponderance of the evidence. (Emphasis added.)

The Court went on to state:

> Once the employer makes an initial showing of willful misconduct, however, the *burden shifts* to the former employee to demonstrate that the conduct cannot be characterized as misconduct within the meaning of NRS 612.385, for example, by explaining the conduct and showing that it was reasonable and justified under the circumstances. (Emphasis added.)

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

The Court should not ignore that *Evans* was decided in 1995 and *Bundley* in 2011. As a result, as long as substantial evidence is in the record that Greystone met its burden of showing misconduct and Murphy failed to show he was justified in his conduct, then the Board's decision should be affirmed.

In the case at bar, the referee stated, "This case differs from Evans." (JA, p. 19) The referee further states, "Here, claimant admitted during the evidentiary hearing that he was guilty of the criminal conduct of being arrested based on a bench warrant issued due to charges brought against him in May 2012." (JA, p. 19) In *Evans,* "She was terminated during the time that she was in jail awaiting trial." *Evans,* 111 Nev. at 119, 901 P.2d at 156. Here, the employer terminated Murphy on June 10, 2012: 9 days after his arrest; 8 days after the first notice by his girlfriend; 2 to 3 days after his girlfriend asked for his check; and the same day he was sentenced to 1 year in jail. As a result, unlike *Evans*, Murphy was not awaiting trial – he was convicted and sentenced when terminated.

Murphy also failed to provide dutiful notice. Besides the initial notice on the day of arrest, and a less clear notice by his girlfriend approximately a week later, the employer received no notice of Murphy's status. In fact, Murphy admits he never asked for a leave of absence. (JA, p. 50, ll. 14-17) In *Evans*, the employee requested three separate 30-day leaves of absence before being terminated. *Evans*, 111 Nev. at 1120, 901 P.2d at 157. As a result, Murphy did not provide his employer with dutiful notice of his absence or status after June 4th.

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

Murphy argues he did not have the ability to call, which may be true, but his girlfriend knew of his whereabouts and status. She stated that she knew he was going in and out of court and that he was sentenced on June 10th; and yet, no one contacted the employer with any details regarding Murphy's status until the 14th. This was not dutiful notice. (JA, p. 52)

Murphy's admitted criminal conduct not only resulted in his incarceration, but it also resulted in his subsequent no call/no show to work. Greystone did not terminate him for his criminal act as Murphy's brief states. Greystone terminated him for being a no call/no show in violation of their clear policy which was known by Murphy. (JA, p. 18) As a result, substantial evidence exists in the record that Greystone met its burden of showing Murphy committed misconduct connected to his work – a violation of a clear company policy known to Murphy.

Murphy's only argument to refute Greystone's proof of misconduct for purpose of NRS 612.385 is to argue that he knowingly committed a crime, possession of stolen property. (JA, p. 19) A crime he later admitted to committing at the administrative hearing. The administrative decision did not find this to be a compelling fact to meet Murphy's burden. Certainly, no reasonable tribunal could conclude that Murphy's criminal act which resulted in a violation of his employer's policy was "reasonable and justified" as required by *Bundley*.

///

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

CONCLUSION

The proper standard of review in this case is whether the Board of Review acted arbitrarily and capriciously in reaching its decision. To determine whether the Board acted arbitrarily and capriciously, the Court looks for substantial evidence in the record to support the Board's findings. In this case, the referee and the Board found that Murphy's circumstances were different from those in the *Evans* case. The decision was based on substantial evidence in the record and as a result, the District Court should be reversed and the Board of Review's decision affirmed.

DATED this 5th day of February, 2015.

NEIL A. ROMBARDO, ESQ.
Attorney for ~~Appellant~~ ESD

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

2. I further certify that this Reply Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Reply Brief exempted by NRAP 32(a)(7)(C), it contains 2,623 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

///

///

///

///

///

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

I understand that I may be subject to sanctions in the event that the accompanying Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of February, 2015.

NEIL A. ROMBARDO, ESQ.
Nevada State Bar No. 6800
Division Senior Legal Counsel
State of Nevada DETR/ESD
1325 Corporate Boulevard, Suite C
Reno, Nevada 89502
(775) 823-6673
(775) 823-6691 - Fax
Attorney for Appellant ESD

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee of the State of Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I electronically filed the foregoing APPELLANT'S REPLY BRIEF with the Clerk of the Nevada Supreme Court; and, as a consequence thereof, electronic service was made in accordance with the Master List as follows:

RON SUNG, ESQ.

I. KRISTINE BERGSTROM, ESQ.

JANET TROST, Settlement Judge

DATED this 6th day of February, 2015.

SHERI C. IHLER

Office of Legal Counsel
STATE OF NEVADA DETR/ESD
1325 Corporate Blvd., Ste. C
Reno, NV 89502
(775) 823-6673
(775) 823-6691 FAX